U.S. Department of Labor Modifies Overtime Rules

By: Stewart M. McGough

On May 18, 2016, the US Department of Labor ("DOL") issued final rules that modify the current overtime pay guidelines and push millions of formerly exempt employees into non-exempt status. These rules will go into effect on December 1, 2016, giving employers a significant amount of time to learn the rules and, if possible, develop strategies to offset the additional costs they will otherwise incur in compensating employees for their overtime work.

A. <u>Current General Rules</u>. The federal Fair Labor Standards Act requires an employee to be paid overtime pay, at 150% of regular pay rates, for time worked over 40 hours in any week, unless the employee fits within one of the following exemptions:

- the employee is paid a salary of $455 each week and satisfies a "duties test" as a bona fide executive, administrative or professional employee ("EAP") (the "white collar" employee exemption);
- the employee is an outside sales person;
- the employee provides skilled computer services (that satisfy a certain "duties test") and is paid a salary of $455 each week or, if paid on an hourly basis, an hourly rate of at least $27.63 (the "computer employee" exemption); or
- the employee is paid total annual compensation of at least $100,000 and customarily and regularly performs at least one of the duties of an exempt EAP (the "highly compensated" employee exemption).

Those employees described above who meet the duties test and received compensation above the thresholds specified are "exempt" employees, meaning the employer does not have to pay the employee overtime rates.

B. <u>New Rules</u>. The new rules do not alter the duties tests (the proposed changes issued in 2014 indicated the DOL's openness to modify the rules to limit further the duties required to meet the exemption). But, the dollar thresholds specified above have been significantly increased, which will broaden the number of non-exempt employees eligible for overtime pay.

- the white collar employee exemption dollar threshold has been more than doubled to $913 per week; and
- the highly compensated employee exemption has been increased to $134,000.

Just as important, for the first time, these dollar thresholds will automatically increase every 3 years (the next increase to take effect January 1, 2020) without going through the rule-making process. The last adjustment in the thresholds occurred in 2004, and undoubtedly the burden of the rule-making process contributed significantly to DOL's inertia in this area, enabling employers to lessen the threat to their profitability. The new rule's adoption of cost of living increases eliminates this advantage to employers.

C. <u>What Employers Should Do</u>. These new rules will force more labor costs upon employers at a time when already thin margins have greatly impacted employers' ability to hire more employees and expand their businesses. We recommend employers take this opportunity to review their current labor arrangements and consider some of the following options to avoid, or at least minimize, the new rules' potential impact:

- learn the new rules;
- audit currently exempt employees' salaries and duties to be sure they qualify under the existing rules before determining what to do after November 30;
- determine strategies in dealing with now exempt, but soon-to-be non-exempt employees (such as increasing compensation to cross the new thresholds; establish strict limits on overtime, but gauge impact on productivity and profitability before doing so and determine impact on employee morale and employee retention);
- communicate the rule changes to employees affected by the changes;
- ensure compliance by newly-non-exempt employees and their supervisors (through tracking of hours; seeking prior approval from supervisors; education of supervisors of the new rules);
- ensure compliance by those newly-non-exempt employees who work away from the office or at home, and establish rules to determine what work can be done away from the office and the recording of hours away from the office;
- update employee manuals and job descriptions to coordinate with both new and existing rules; and
- identify the impact of the new rules on any employee benefits (such as paid time off and leave programs).

We are glad to review these rules with you and determine how to address them within your business structure.

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